United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

276

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,935

United States of America

v.

Ignatius F. Perry, Jr.,
Appellant

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

John Guandolo
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1000 - 16th Street, N.W.
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STATEMENT OF QUESTIONS PRESENTED

1. Whether the warrantless search of Appellant's automobile was without reasonable or probable cause.

2. Whether the warrantless search of Appellant's automobile was unlawful.

(The pending case was not previously before this Court.)

References to Rulings

Motion to Suppress by Appellant denied by Judge John Lewis Smith, Jr., U. S. District Judge, on July 31, 1970 (Tr. p. 12), and again denied on December 21, 1970 (Tr. p. 7).

STATEMENT OF QUESTIONS PRESENTED

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Appellant

APPEAL FROM THE
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JURISDICTIONAL STATEMENT

This is an appeal from the United States District Court for the District of Columbia from a conviction before a judge on a charge of carrying a dangerous weapon in violation of Title 22, Section 3204, D. C. Code. Jurisdiction in this Court is based upon Title 28, Section 1291, U. S. Code.

STATEMENT OF CASE

Appellant, Ignatius F. Perry, Jr., was charged in an indictment returned in the District Court on March 25, 1970, with carrying a dangerous weapon in violation of Title 22, Section 3204, D. C. Code. On April 27, 1970, Appellant was arraigned, at which time he entered a plea of not guilty.

Appellant, on July 29, 1970, filed a motion to suppress and for the return of property on the grounds that he was arrested without a warrant and without reasonable or probable cause and that the aforesaid actions of the arresting officers were unlawful, against the will and consent of Appellant's rights under the Constitution and the laws of the United States. The motion was argued before the Court on July 31, 1970, and was denied.

The motion to suppress was renewed orally by appellant on December 21, 1970, and after further argument before the Court was denied. (Tr. 7)

With the consent of the United States Attorney and the approval of the Court, Appellant, on December 21, 1970, waived his right to trial by jury and was tried by the Court. The facts in the case were stipulated. Appellant was convicted on December 21, 1970, of the offense of carrying a dan-

gerous weapon in violation of Title 22, Section 3204, D. C. Code, and was sentenced to jail for a period of one year to three years, said sentence to run concurrently with any other sentence now being served.

STATUTES INVOLVED

District of Columbia Code

Title 22, Section 3204. Carrying concealed weapons.

> "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (July 8, 1932, 47 Stat. 651, ch. 465, § 4; Nov. 4, 1943, 57 Stat. 586, ch. 296; Aug. 4, 1947, 61 Stat. 743, ch. 469; June 29, 1953, 67 Stat. 94, ch. 159, § 204(c).)"

STATEMENT OF POINTS

Appellant, Ignatius F. Perry, intends to rely on the following points on appeal:

1. The refusal of the trial judge to suppress evidence obtained as a result of unlawful search and seizure was error.

ARGUMENT

I

The Refusal Of The Trial Judge To Suppress Evidence As A Result Of Unlawful Search And Seizure Was Error

(Refer to transcript of proceedings of July 31, 1970, pages 2 through 12, and transcript of proceedings of December 21, 1970, pages 2 through 12.)

Appellant's conviction of the offense, carrying a dangerous weapon in violation of Title 22, Section 3204, D. C. Code, is based solely on the discovery by two police officers of the Metropolitan Police Department of a loaded revolver in Appellant's car. The principal question presented on appeal is whether the holster, bullets, and loaded revolver should have been received as evidence in the face of Appellant's motion to suppress.

The facts, as recited in the transcript of proceedings held on July 31, 1970, at pages 2 through 7, show that Appellant was stopped on February 12, 1970, by two police

officers for speeding in an automobile on the streets of the District of Columbia.*/ Appellant, upon request, furnished the officers with proper driving credentials. After examining the driving credentials, the officers made a routine check with the Metropolitan Police Department to determine whether Appellant had any outstanding parking warrants against him. The officers received information from headquarters that there were fourteen outstanding parking warrants against Appellant. When asked about this, Appellant stated that the parking tickets had been paid but that he had no receipts to prove that payment had been made. Based on the information received from headquarters, the officers called for a vehicle to transport Appellant to a police station to pay for the parking tickets. It subsequently was determined that the parking tickets had actually been paid by Appellant and that the information received by the officers from headquarters was erroneous. No charge was placed against Appellant for speeding, nor was any other traffic violation charge placed against Appellant.

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*/ In a statement made to the trial judge on December 21, 1970, Appellant indicated that he was not speeding, but was stopped by the officers because of a noisy muffler. However, the stipulation of facts agreed upon by Appellant and on which he was tried shows that he was stopped for speeding.

While awaiting the arrival of the vehicle to transport Appellant to a police station to pay for the supposedly outstanding parking warrants, the officers searched Appellant and found some bullets in his left front pocket, and a gun holster in his left coat pocket. No gun was found on Appellant. Upon arrival of the transport vehicle, Appellant was immediately placed in it by the officers. Then the officers, without a search warrant, searched the car. Upon searching the car, the officers found a loaded revolver. The revolver was not in plain view, but was found wedged in between the front seat cushion and the back of the front seat.

The motion to suppress filed by Appellant was denied by the trial judge on July 31, 1970, after hearing testimony of one of the police officers. The trial judge found (Tr. 12) "that the arrest was legal" and the search of Appellant's "person and car was proper." On December 21, 1970, the motion to suppress was renewed and it was again denied by the trial judge. The ruling of the trial judge thus became the law of the case. Appellant was then tried on the

basis of stipulated facts */ and convicted of the offense of carrying a dangerous weapon.

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*/ The transcript of proceedings of December 21, 1970, shows (pp. 8-9) that Appellant stipulated to the following facts (the stipulation does not contain all of the facts relating to the circumstances surrounding the warrantless search as recited in the transcript of proceedings held on July 31, 1970):

> ". . .on or about February 11, 1970, within the District of Columbia, the Defendant, Ignatius Perry, was arrested on the streets of the District of Columbia after having driven his car at a speed in excess of that allowed by law; and after, there was discovered on the search of his person a number of bullets of live ammunition which were unregistered and in his possession, as well as a holster for a gun; and the police officers, Christensen and Williams conducted a search of the automobile from which the Defendant had alighted at the time he was stopped and found therein one pistol, a 38-caliber Colt, which was test-fired in the presence of Officer Christensen and found to be operative....a search of the records of the Metropolitan Police Department was made by the inspector of the Records Division and he has certified that on February 11, 1970, the Defendant Ignatius Perry did not have a license to carry a pistol as provided by the law of the District of Columbia.
>
> * * * * *
>
> ". . .this arrest and this seizure of the weapon was not in a place of the Defendant's business, on any land possessed by him, nor, in fact, in a dwelling house of his....Defendant Ignatius Perry would be identified as the person who was arrested on that day and in whose possession this gun was."

The motion to suppress should have been granted by the trial judge as the search of Appellant's automobile did not meet the test of reasonableness under the Fourth Amendment to the Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons of things to be seized."

The search and seizure was not justified as incident to a lawful arrest. (It is questionable whether an arrest was involved. As discussed above, Appellant was stopped for speeding but was not charged with such a violation or any other traffic violation. Although Appellant was taken into custody, this was for the purpose of taking him to a police station to pay for what the officers believed were outstanding parking tickets.) Of course, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. Preston v. United States, 376 U.S. 367 (1964). This right to search and

seize without a search warrant extends to things under the accused's immediate control, and, to an extent depending on the circumstances of the case, to the place where he is arrested. Preston v. United States, supra. As stated in the Preston case (at p. 367):

> "The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime--things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control."

The above justifications, however, are absent where a search, as is true here, "is remote in time or place from the arrest." Preston v. United States, supra. The search of appellant's automobile was not undertaken until Appellant had been taken into custody and placed in a vehicle to be taken to a police station to pay for the supposedly outstanding parking warrants. At this point there was no danger that Appellant could have used the revolver found in the automobile or could have destroyed any evidence of a crime--assuming that the revolver can be the "fruit" or "implement" of an alleged traffic violation. Nor was there any danger that the automobile would be moved out of the locality or juris-

diction since Appellant was in custody. See Preston v. United States, supra., at 368. The search was too remote in time or place to have been made incidental to the "arrest," therefore, the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible. See Preston v. United States, supra., at 368.

The Preston case was cited with approval in Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968), in which the Supreme Court held that a search by state police officers of an automobile after the arrest of the occupants, which search did not take place until the occupants were in custody inside a courthouse and the automobile was parked on the street nearby, was too remote in time or place to be justifiable as an incident of a valid arrest. The Preston case also was cited with approval in Chimel v. California, 395 U.S. 752 (1969), where the Supreme Court held that there was no constitutional justification, in the absence of a search warrant, for extending a search beyond the area from within which the arrested person might have obtained either a weapon or something that could have been used as evidence against him.

In the recent case of Chambers v. Maroney, 399 U.S. 42 (1970), the principal question concerned the admissibility of evidence seized from a station wagon, in which the petitioner was riding at the time of his arrest, after the station wagon was taken to a police station and was there searched without a warrant. The facts show that a service station attendant was robbed by two men each of whom carried and displayed a gun. Two teenagers saw a light blue compact station wagon with four occupants circling the block in the vicinity of the service station and the station wagon later was seen speeding away from a parking lot nearby. One of the men was said to be wearing a green sweater. The service station attendant said that one of the men who robbed him was wearing a green sweater and the other was wearing a trench coat. A description of the station wagon and the two robbers was broadcast over the police radio. Within an hour, a station wagon answering to the description and carrying four men was stopped by the police about two miles from the station. Petitioner was one of the men in the station wagon, and he was wearing a green sweater. A trench coat also was in the station wagon. The occupants were arrested and the station wagon was driven to the police station. In the course of a search of the station wagon, the police found

certain evidence concealed therein. The Supreme Court upheld the warrantless search.

The situation in the Chambers case obviously was considerably different than that involved here. The police had probable cause to believe that the robbers, carrying guns and the fruits of the crime, had fled the scene in a light blue compact station wagon which would be carrying four men, one wearing a green sweater and another wearing a trench coat. There was probable cause to arrest the occupants of the station wagon that the officers stopped, and, just as obviously, there was probable cause to search the car for guns and stolen property. In the situation involved here, Appellant was stopped for speeding. It is apparent that the officers had no cause to believe that evidence of a crime was concealed in the automobile. Thus the suggestion that there was probable cause to search the automobile must be rejected.

As shown above, the situation here is virtually identical with that involved in the Preston case. Therefore, the guiding principles established in Preston must govern. The decision of the Supreme Court in the Chambers case does not discard the approach taken in Preston. It is pointed out that the Supreme Court went out of its way to distin-

guish (at 47-48) the facts in the Chambers case, which gave the police probable cause to believe that a search of the station wagon would produce the fruits or implements of the crime for which the arrest had been made, from the situation it had considered earlier in Preston.

The decision of the District of Columbia Court of Appeals on April 15, 1970, in No. 5380, Mayfield v. United States, is pertinent to the issue involved here. In the Mayfield case, there was a conviction of unlawful possession of narcotics which was based entirely on a police officer's discovery in an automobile of an envelope containing a small quantity of marijuana. The question presented on appeal was whether the envelope and its contents should have been received as evidence in the face of a defense contention that these items were obtained by a search and seizure contravening Fourth Amendment standards.

The facts show that the police were making routine checks of automobiles because reports of window breaking had been received. Mayfield, driving with two others, was stopped by a police officer and asked to produce his license and registration. As a stamped notation on the permit revealed a suspension, the officer arrested him for operating a motor vehicle without a valid license. Mayfield was taken

to a police station where he was booked on the same charge for which he was arrested. He was detained for inability to post collateral. The automobile was driven to the police station where it was searched, and an inventory made of its contents. One of the items discovered was a brown envelope which the officers had previously observed Mayfield stuffing under the front seat when he went back to the automobile momentarily after being notified that he was under arrest. Mayfield was then charged with unlawful possession of narcotics. The Court held that in the light of the doctrines established in the Preston and Dyke cases, a motion to suppress should have been granted. It found no circumstances which would have given the police officers probable cause to believe that a search of the automobile would disclose the presence of narcotics. It said that while the officers who made the search were the ones who testified as to having seen Mayfield slip an envelope under the seat, neither claimed this action suggested an attempt to conceal narcotics.

In light of the guiding principles, it is submitted that the search involved in this case was too remote in time or place to have been made as incidental to the alleged arrest, and, therefore, the search of the automobile without a warrant failed to meet the test of reasonableness under

the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible.

In United States v. Tate, 209 F. Supp. 762 (D. Del. 1962), a police officer overtook the defendant after a 100 mile per hour chase, arrested him for speeding, and informed him that he would not be permitted to drive his own car to the police station. The defendant offered resistance and therefore was subdued and handcuffed. He was placed on the front seat of the police car. The officer then searched defendant's car without a warrant, where he found a sawed-off shotgun under the front seat. This formed the basis of the prosecution. In holding the search unreasonable and unconstitutional, the court said (at 765):

> "The record in this case lacks any indication of what the trooper was looking for in Tate's automobile. Quite obviously, he could not have been looking for the fruits of the crime for which Tate was arrested--there are no fruits of speeding. He certainly could not have been searching under the car seat for the means by which the crime was committed--the whole automobile itself was the means. He was not looking for forfeited property such as a sawed-off shotgun, which he had no means of knowing about, and the mere fact that such property unexpectedly turned up does not render the search valid. Byars v. United States, 273 U.S. 28, 29, 47 S.Ct. 248, 71 L. Ed. 520 (1927). There was no general police alarm being broadcast for a person of defendant's

description, nor did the trooper upon arresting defendant recognize him as a person with a long criminal record.

"The government contends that the search can be justified as a search for weapons of escape from custody. This argument is difficult to accept either factually or legally. There is no direct testimony in the record that the trooper was looking for a weapon, either legal or illegal, in Tate's auto, or that he even suspected the existence of one. Moreover, the surrounding circumstances do not lead me to infer that such was the purpose of the search. The trooper testified that he handcuffed and placed the defendant in the patrol car for his own (the trooper's) protection. Once this was done, he was positive he could not escape and get at any weapon or weapons concealed in his own automobile. I can only conclude, therefore, that this search was for the purpose of a general exploration for whatever might turn up.

"While it cannot be denied that a search for weapons which may be used to assault the arresting officer or to effect an escape may be necessary in many or most instances, and conceding that great deference should be paid to an officer's decision that a search for weapons is necessary, nevertheless, to consider all searches for weapons incidental to an arrest as reasonable per se would permit wholesale fishing expeditions whenever a legal arrest is made."

See also, United States v. Gladden, 242 F. Supp. 499 (D. Oreg. 1965); Grundstrom v. Beto, 273 F. Supp. 912 (N.D. Tex. 1967); and Colosimo v. Perini, 415 F. 2d 804 (6 Cir. 1969).

CONCLUSION

Because of the error of the trial judge in refusing to suppress evidence obtained as a result of unlawful search and seizure, the judgment should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was mailed to the U.S. Attorney, Appeals Division, U.S. Court House, Washington, D. C. 20001, this 30th day of April, 1971.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,335

UNITED STATES OF AMERICA, APPELLEE

v.

IGNATIUS F. PERRY, JR., APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
RICHARD A. HIBEY,
JOHN S. RANSOM,
Assistant United States Attorneys.

Cr. No. 485-70

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether appellant's motion to suppress was properly denied when the uncontradicted evidence showed that after he was arrested and a search of his person disclosed a shoulder holster and eleven rounds of .38 caliber ammunition, the police conducted a limited search of the car he had been driving and found a revolver hidden between the cushions of the front seat.

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,935

UNITED STATES OF AMERICA, APPELLEE

v.

IGNATIUS F. PERRY, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On March 25, 1970, appellant was charged in a one-count indictment with carrying a dangerous weapon (22 D.C. Code § 3204). He was tried without a jury before the Honorable John Lewis Smith, Jr., on December 21, 1970, and was found guilty. On that same date appellant was sentenced to a term of imprisonment for one to three years, to be served concurrently with any other sentence then being served.[1] This appeal followed.

[1] Sentence was imposed on the same day because he had previously been convicted in Criminal Cases Nos. 1414-69 and 1423-69 before the same judge, that same year, for the sale of narcotics. He was sentenced in the latter case to a mandatory minimum term of imprisonment for ten years.

On July 31, 1970, the court heard appellant's motion to suppress evidence. Only the testimony of the arresting officer, Curtis Earl Williams of the Metropolitan Police, was presented at the hearing. Officer Williams testified that on February 12, 1970, while cruising in the company of his partner, Officer Robert Christenson, he observed appellant in the 1400 block of Irving Street, Northwest, proceeding in his automobile at speeds up to fifty miles an hour in an area where the speed limit was twenty-five miles an hour. The time was approximately 12:25 a.m. The officers followed appellant for about five blocks before stopping him. After identifying appellant in court, Officer Williams related that after stopping appellant, he asked him for his operator's permit, which he produced, and then made a call to the headquarters of the Special Operations Division to determine if the permit was valid. The information from headquarters was that appellant had fourteen warrants issued for his failure to pay parking fines. The officer requested transportation to take appellant to the precinct.[2]

When the transport vehicle arrived, a limited search of appellant was conducted by Officer Williams. In appellant's left front pocket he found eleven live rounds of .38 caliber ammunition; inside the left coat pocket was a shoulder holster. After placing appellant in the transport, the officers conducted a limited search of his automobile for a weapon and "found on the front seat between the cushion and the back a .38 revolver with six live rounds." The revolver was not in plain view when the officers entered the vehicle, and at that time appellant had already been placed in the transport vehicle.

Appellant thereafter rested his case. The Government placed into evidence without objection the revolver and the rounds of ammunition. After limited questioning by the court, and a further question by appellant relating to

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[2] At the scene of appellant's arrest, he stated to the officers that he had paid the parking tickets which were the basis for the outstanding warrants. At the precinct the officers discovered that the parking tickets had indeed been paid (Mot. Tr. 4-5).

the return of $465 which was recovered from him at the time of his arrest, the court denied appellant's motion (Mot. Tr. 1-12).

On December 21, 1970, when appellant's case was called for trial, he renewed his motion to suppress, which once again was denied. Appellant waived his right to trial by jury, and after questioning by the court to determine whether he understood his right to trial and whether his waiver was voluntary, the court accepted the waiver. The trial proceeded by stipulation. The basic facts comprising the stipulation were that appellant was stopped for speeding, that a search of his person uncovered the bullets and shoulder holster, and that the search of his car thereafter revealed the revolver for which he had no permit. The court inquired if appellant agreed to the facts as presented and if he stipulated to the accuracy of the facts. Appellant answered affirmatively to both questions.[3] Appellant was thereafter found guilty as charged (Tr. Tr. 1-12).

ARGUMENT

The trial court properly denied appellant's motion to suppress the revolver.

(Mot. Tr. 1-12; Trial Tr. 1-12).

Appellant contends that the trial court erred in not granting his motion to suppress. He principally argues that the search of his automobile after his arrest was not based on probable cause and was thus unlawful. Specifically, appellant asserts that the seizure of the revolver from his automobile, after his arrest and the recovery from his person of a shoulder holster and eleven rounds

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[3] After appellant noted his agreement with the facts of the stipulation, he stated that he had paid the parking tickets and was not speeding at the time of his arrest; he did admit, however, that his muffler was loud. The court thereafter inquired if appellant agreed to the "accuracy of the facts as stated, the circumstances of the arrest," to which appellant again replied that he did (Tr. Tr. 10-11).

of .38 caliber ammunition, was not justified as incident to a lawful arrest, since the search was remote in time and place from the arrest.

Initially we note that appellant does not appear to claim that his arrest was invalid, nor do we believe such a claim would be viable. Appellant was arrested for speeding [4] and was thereafter taken into custody [5] because a check by the arresting officer revealed that appellant had fourteen outstanding warrants issued as a result of his failure to pay parking tickets.[6] Although appellant appears to contend that he was never arrested but merely "taken into custody" (Brief for Appellant, p. 8), it does not appear that placing one in a transport vehicle for removal to the precinct lends itself to any interpretation but that of an arrest. Appellant's other parenthetical reference to the arrest, that he was never formally charged with speeding (Brief for Appellant, p. 8), also does not vitiate the arrest, since it is of no consequence that the prosecuting authorities chose to charge appellant with the crime which is the subject of the instant appeal rather than the traffic offense. *Cf. Hutcherson* v.

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[4] Although appellant belatedly claims he was not speeding but was stopped because of his noisy muffler (Brief for appellant, p. 5), it is clear that his arrest could have been effected for that violation as well, and appellant does not contend otherwise.

[5] While it may not be the usual practice of the Metropolitan Police to effect an arrest for this sort of traffic violation, the additional circumstances presented here, *i.e.*, the outstanding warrants, provided the officers with reasonable grounds to anticipate that appellant would not obey a citation issued for speeding. *See United States* v. *Johnson*, —— U.S. App. D.C. ——, —— n.6, 442 F.2d 1239, 1244 n.6 (1971), citing Metropolitan Police Department General Order No. 3, Series 1959, dated April 24, 1959. The general order states in pertinent part:

> Only in the more serious or aggravated types of traffic violations, those which indicate a serious disregard for the safety of others, or those in which *the officer has reasonable grounds to believe that the individuals concerned will, in all probability, ignore the Traffic Violation Notices*, should it be necessary to make summary arrests . . . . [Emphasis added.]

[6] See footnote 2, *supra*.

United States, 120 U.S. App. D.C. 274, 345 F.2d 964, *cert. denied*, 383 U.S. 894 (1965).

Appellant contends, however, that even assuming the validity of the arrest, as he does, the search of his automobile was not based on probable cause and was therefore unlawful. The uncontradicted evidence shows that after the transport vehicle had arrived on the scene, appellant was subjected to a limited search prior to being placed in it. The search disclosed eleven live rounds of .38 caliber ammunition in his pocket and a shoulder holster in another pocket.[7]

Once the officers discovered the ammunition and the shoulder holster, the limited search of appellant's automobile immediately thereafter[8] was reasonable and lawful. *Cf. United States* v. *Miller*, D.C. Cir. No. 22,332, decided March 23, 1970. The cases relied upon by appellant do not compel a different conclusion.[9] One case cited by appellant, *Chambers* v. *Maroney*, *supra* note 8, supports appellee here. *In Chambers* the police stopped an automobile, which had shortly before been used as a get-

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[7] Since appellant's arrest was valid, the limited search incident to that arrest, which did not have to be confined to a limited frisk, *see, e.g., Worthy* v. *United States*, 133 U.S. App. D.C. 188, 191, 409 F.2d 1105, 1108 (1968), was also valid. *See, e.g., Thomas* v. *United States*, 134 U.S. App. D.C. 48, 49, 412 F.2d 1095, 1096 (1969). Appellant does not contend otherwise.

[8] Appellant's contention that the search of his automobile was remote in time and place can only be understood to refer to his ability to exercise personal control over the revolver. The uncontradicted evidence was that a limited search of his car occurred immediately after the discovery of the ammunition and the shoulder holster on his person. In any event, even if his automobile had been searched at a time and place remote from his arrest, *see, e.g., Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968), the result in the instant case would be no different because the police had probable cause for the search. *Chambers* v. *Maroney*, 399 U.S. 42 (1970).

[9] Appellant's reliance on *Preston* v. *United States*, 376 U.S. 364 (1964), *Dyke* v. *Taylor Implement Mfg. Co.*, *supra*, and other similar cases is misplaced, since those cases are inapposite for the reasons stated in *Chambers* v. *Maroney*, *supra* note 8; *i.e.*, in the *Preston* line of cases the police had no valid reasons to search the automobiles at all.

away car after an armed robbery, and the occupants were arrested. The Supreme Court ruled that the search of the automobile thereafter without a warrant for the proceeds of the robbery and the weapons used was reasonable, since it was manifest that these articles had not been disposed of prior to the arrest. Thus, in essence, the ruling was that where the police may logically conclude that an automobile contains contraband, weapons or other similar items, the police are justified in entering the automobile without a warrant to search for such illicit articles.

Similarly, in the instant case, the arresting officers concluded from the facts within their knowledge that the revolver was in the car. Appellant had been stopped by the police for speeding and had only a brief moment in which to discard the revolver hidden on his person.[10] When appellant was stopped, placed under arrest and searched, a shoulder holster and eleven rounds of .38 caliber ammunition were discovered, but no revolver. The inescapable conclusion was that the revolver was in the car, most probably within a limited area within accessibility of the driver of the automobile. *Cf. McGee* v. *United States*, 270 A.2d 348 (D.C. Ct. App. 1970). Under very similar circumstances the District of Columbia Court of Appeals has noted:

> It is enough for us that, upon finding approximately nine rounds of .22 caliber ammunition on appellant's person when searched prior to incarceration [for the commission of traffic violations], it was reasonable to believe appellant was carrying a pistol; and since it was not on his person, it was likewise reasonable to believe the gun was in the vehicle he had just left. *Hurley* v. *United States*, 273 A.2d 840, 841 (D.C. Ct. App. 1971).[11]

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[10] Appellant's admission that he was carrying the revolver to his wife from whom he was separated appears implausible in light of the shoulder holster (Tr. 10).

[11] We note additionally that the officers did not conduct an unlimited search of the automobile but apparently went immediately

Further, contrary to appellant's assertion, the automobile was subject to almost immediate removal, and it need hardly be said that the occupant had been alerted to the possibility that the police possessed sufficient knowledge to search his automobile for a firearm. *See Chambers* v. *Maroney, supra* note 8. Although the record is barren of evidence to indicate whether or not the automobile might have been removed at appellant's direction by another person, we reject appellant's speculative assertion that there was no "danger that the automobile would be moved out of the locality or jurisdiction" (Brief for Appellant, p. 9). Not only was appellant possessed of sufficient funds ($465) to secure his immediate release, but, unknown to the arresting officers, the outstanding warrants had already been satisfied. Appellant could easily have returned to his automobile and either removed it or disposed of the revolver. To contend otherwise merely ignores the facts.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
RICHARD A. HIBEY,
JOHN S. RANSOM,
Assistant United States Attorneys.

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to the spot where a weapon would probably be located. Whether the conduct of the officers would have been unreasonable under different circumstances is a question not raised by this record.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,935

United States of America

v.

Ignatius F. Perry, Jr.,
Appellant

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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1000 - 16th Street, N. W.
Washington, D. C. 20036

Cr. No. 485-70

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TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,935

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REPLY BRIEF FOR APPELLANT

Preliminary Statement

Certain assumptions of fact have been made by the government in its brief which are not supported by the record, and it relies on a number of cases to support its position which are not applicable to the facts involved in this case. In addition, certain contentions made by the government are untenable. Appellant's reply brief gives consideration to these matters.

ARGUMENT

I

Certain Assumptions Of Fact Have Been Made By The Government In Its Brief Which Are Not Supported By The Record

The following statements appear in the government's brief:

> ". . . After placing appellant in the transporting vehicle, the officers conducted a limited search of his automobile for a weapon and 'found on the front seat between the cushion and the back a .38 revolver with six live rounds' . . ." (p. 2)

> "Once the officers discovered the ammunition and the shoulder holster, the limited search of appellant's automobile immediately thereafter was reasonable and lawful . . ." (p. 5)

> ". . . The uncontradicted evidence was that a limited search of his car occurred immediately after the discovery of the ammunition and the shoulder holster on his person . . ." (p. 5, n. 8)

> ". . . The inescapable conclusion was that the revolver was in the car, most probably within a limited area within accessibility of the driver of the automobile . . ." (p. 6)

> "We note additionally that the officers did not conduct an unlimited search of the automobile but apparently went immediately to the spot where a weapon would probably be located. Whether the conduct of the officers would have been unreasonable under different circumstances is a question not raised by this record." (pp. 6-7, n. 11)

In order to establish that the conduct of the officers was reasonable under the surrounding circumstances, the government makes the assumption that a limited search of appellant's automobile occurred. This assumption, however, cannot be made upon the basis of the record. If any assumption is to be made it would be that the search involved a general exploration for whatever might turn up.

There is nothing in the stipulation of facts, the basis on which appellant was tried, to indicate that only a limited search occurred. The stipulation states that the officers "conducted a search of the automobile." Nothing is said about a limited search. Nor is there anything in the testimony presented at the hearing on the motion to suppress to indicate that only a limited search occurred. This is revealed by the following testimony (Tr. 5-6):

Q You placed him in the transport?

A That is correct.

Q At this time did you find any revolver on Mr. Perry?

A No, sir.

Q Then you searched the car, is that correct?

A Yes, sir.

Q And did you have a warrant when you searched the car?

A No, sir.

Q What did you find in the car?

A I found on the front seat between the cushion and the back a 38 revolver with six live rounds.

Q Now, when you opened the door, did you see this revolver?

A No, sir.

Q It was not in plain view, is that correct?

A No, sir.

Q And Mr. Perry had already been put in custody?

A Yes, sir.

Q And at no time did you have a warrant for that car?

A No, sir.

Q So you were in -- you were not in any danger or anything of that nature, were you?

A No, sir.

Q Did you immediately search the car at that time, sir?

A Yes, sir.

Another assumption made by the government (p. 6) to establish that the conduct of the officers was reasonable is that at the moment appellant was stopped by the officers he discarded the revolver hidden on his person. There is nothing in the record to support this assumption. The stipulation of facts is silent on the subject. The testimony of

the officer at the hearing on the motion to suppress indicates merely (Tr. 3-4) that appellant was stopped for speeding and asked to show his driving credentials. There was nothing said about observing appellant discard a revolver hidden on his person.

Still another assumption made by the government (p. 7) is that an immediate search of the automobile was necessary because appellant "could easily have returned to his automobile and either removed it or disposed of the revolver." This assumption has no validity. The facts show that appellant was taken into custody and placed in a vehicle to be taken to a police station to pay for the supposedly outstanding parking warrants. Thus there was no danger that appellant could have "returned to his automobile and either removed it or disposed of the revolver." Any suggestion that appellant had sufficient funds "to secure his immediate release" or that he would have been released immediately because "unknown to the arresting officers the outstanding warrants had already been satisfied" is without merit. Actually, the money appellant had in his possession was taken away by the authorities. It was not until a request was made for the return of the money at the hearing on the motion to suppress that the government indicated that it would have no objection to its return. (Tr. 8) Insofar as the outstanding warrants

are concerned, there is nothing in the record to indicate when it was learned that the warrants already had been satisfied.

II

The Cases Cited By The Government Are Not Applicable To The Facts Involved In The Subject Case

The government contends (p. 5) that though incident to an arrest for a traffic violation the search was not for that reason required to be limited to a frisk. It argues that because a shoulder holster and ammunition were found on appellant upon his being searched incidental to the arrest, the police officers were not confined to a limited frisk but were permitted to search the automobile. The following cases are cited in support of the government's contention: United States v. Miller, D.C. Cir. No. 22,332, decided March 23, 1970; Worthy v. United States, 133 U.S. App. D.C. 188, 191, 409 F. 2d 1105, 1108 (1968); and Thomas v. United States, 134 U.S. App. D.C. 48,49, 412 F. 2d 1095, 1096 (1969). These cases are distinguishable and, therefore, are not applicable here.

In the Miller case, the police entered a suite of offices in hot pursuit of an armed and fleeing felon. The felon had robbed a liquor store, taking some cash and a bottle

of whiskey. Although the man sought was in view from the moment the door was opened, they had no way of knowing who else might be on the premises. In those circumstances, the court felt that the police could justifiably conduct a search of the suite to assure themselves that no hostile and possibly dangerous persons were hiding in other rooms. Seizure of a bottle of whiskey in plain view in the suite and its subsequent admission into evidence therefore were proper.[1/]

In the Worthy case, defendant was arrested for vagrancy and upon being searched for a weapon incidental to the arrest was found to be carrying narcotics in his coat pocket. The narcotics thus were found on the person of defendant, not in an automobile. In the Worthy case, the court said (at p. 1110):

1/ A gun also was seized and admitted in evidence. The court said (p. 4) that defendant had no standing to challenge the search that produced the gun since the gun belonged to the person whose suite was entered and further that the gun was found in a drawer which defendant had no authority to open or use. Consequently, even if the search or seizure of the gun were unlawful, defendant had not established that he was the victim of an invasion of privacy. Defendant was said to have standing to challenge the introduction of the bottle of whiskey in evidence since he was authorized to use the place in which it was found.

> "While the nature of an arrest for vagrancy no doubt precludes authority to search the arrestee for evidence of vagrancy, or for an instrumentality of vagrancy, this nature of the offense does not render the seized narcotics inadmissible as evidence in the case; for the search which led to their seizure had the lawful purpose of a search for a weapon, and the record does not show that it exceeded the scope permissible for that purpose."

The only issue involved in the Thomas case was whether a search of defendant's person was illegal because it was not incidental to a valid arrest. The defendant was arrested for attempted unlawful entry, and was frisked by the officer making the arrest. Narcotics were found in defendant's possession. The court held that since the arrest was valid, the search was reasonable. It commented (p. 1096):

> ". . . If it be assumed that the arresting officer was acting in good faith, the circumstances were such that it could be said that a misdemeanor took place in his 'presence' as distinct from 'within his view.' The former has customarily been thought to embody a less restricted spatial concept than the latter, and to comprehend awareness through senses other than that of vision alone . . ."

The government contends (p. 6) that the police officers were justified in searching the automobile because it was an "inescapable conclusion" that the revolver was in the automobile in view of the fact that a shoulder holster and ammunition were found on appellant's person. It cites Hur-

ley v. United States, 273 A. 2d 840, 841 (D.C. Ct. App. 1971), and McGee v. United States, 270 A. 2d 348 (D.C. Ct. App. 1970), in support of its contention.

The government states that under similar circumstances as those involved here, the Hurley case noted as follows:

> ". . . It is enough for us that, upon finding approximately nine rounds of .22 caliber ammunition on appellant's person when searched prior to incarceration, it was reasonable to believe appellant was carrying a pistol; and since it was not on his person, it was likewise reasonable to believe the gun was in the vehicle he had just left . . ."

In the Hurley case, defendant was charged with two traffic violations. He indicated to the police officer that he did not intend to post collateral so the officer told him to follow along in his car to the police station. As they were entering the police station, defendant physically threatened the officer and did so again inside the station. Defendant was charged with disorderly conduct and was searched prior to incarceration. He was found to be carrying ammunition. After defendant was incarcerated, the officer went to the car for the purpose of moving it to the police parking lot for safekeeping. Defendant was not the registered owner of the car. Upon entering the car, the officer found a pistol protruding from under the front seat. The registered owner of

the car came into the station shortly thereafter, having been placed under arrest for another charge. He said that his wife was en route to post collateral and he would remove the car. For this reason the car was not impounded. The court held that under these circumstances there was probable cause to search the car for the pistol. It said that because of its mobility, a car may be searched without a warrant in circumstances which would not justify the search without a warrant of a house or an officer, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize. An important element involved in the Hurley case is missing in the instant case. As noted by the court (p. 841):

> "This car was known to belong to another person, who had the right to drive it away at any time. Hence, it was not practicable to obtain a search warrant to search the car."

It is significant that in quoting from the Hurley case, the government failed to include the above statement by the court which forms a part of the subject matter quoted by the government.

The McGee case involved factual circumstances quite different from those involved here. In that case the officer made several attempts to stop the defendant and finally

had to cut in front of his vehicle in order to bring defendant to a halt. The officer observed defendant reach down below the front seat of the car toward the floorboard and apparently place something under the seat. After defendant was stopped he was asked to step out of the car. The officer then reached under the seat and recovered a pistol. The court noted (p. 350) that the significance of defendant's movement was that it was made simultaneously with the realization that he was about to be halted. The officer, therefore, was reasonably justified in suspecting that defendant was attempting to conceal contraband or the instrumentality of a crime. Thus the search of defendant's car in the area in which it appeared that he was attempting to hide such was reasonable.

III

It Is Questionable Whether Appellant Was Arrested Since He Was Merely Placed In Custody For The Purpose Of Taking Him To A Police Station To Pay For What Were Supposed To Be Outstanding Parking Tickets

The government states (p. 4) that appellant "does not appear to claim that his arrest was invalid, nor do we believe such a claim would be viable." This statement is based on appellant's claim that it is questionable whether an arrest was involved. The validity of the arrest is thus in issue.

Appellant was stopped for speeding. No charge was placed against him for speeding or for any other traffic violation.[2/] He was placed in custody for the purpose of taking him to a police station to pay for what the officers believed were outstanding parking tickets. As it turned out, the parking tickets already had been paid by appellant. If it is assumed that this constitutes an arrest then such an arrest would be unwarranted since the parking tickets were not outstanding.

The government admits that it "may not be the usual practice of the Metropolitan Police to effect an arrest for this sort of traffic violation," but argues that "the additional circumstances presented here, i.e., the outstanding warrants, provided the officers with reasonable grounds to anticipate that appellant would not obey a citation issued for speeding." This argument, which apparently is used by the government to establish the validity of the arrest, is without merit.

2/ The claim by the government (p. , n. 4) that appellant could have been arrested for having a noisy muffler is inapposite. This claim is derived from a statement made by appellant to the trial judge, which is not a part of the stipulation of facts on which he was tried.

CONCLUSION

WHEREFORE, for the reasons stated in appellant's brief and reply brief, the judgment of the District Court should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief was mailed to the U.S. Attorney, Appeals Division, U.S. Court House, Washington, D. C. - 20001, this 13th day of September, 1971.

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